



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

FEB 9 2011

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Jason Torchinsky, Esq.  
Holtzman Vogel PLLC  
98 Alexandria Pike, Suite 53  
Warrenton, VA 20186

RE: MUR 6326  
American Association of Physician Specialists, Inc.  
American Association of Physician Specialists, Inc.  
PAC and Stephen Montes, in his official capacity  
as treasurer  
William J. Carbone

Dear Mr. Torchinsky:

On July 15, 2010, the Federal Election Commission (the "Commission") notified your above-captioned clients of a complaint alleging that your clients violated the Federal Election Campaign Act of 1971, as amended (the "Act"), and provided your clients with a copy of the complaint.

After reviewing the allegations contained in the complaint, your clients' response, and publicly available information, the Commission on February 1, 2011, found reason to believe that the American Association of Physician Specialists, Inc., the American Association of Physician Specialists, Inc. PAC and Stephen Montes, in his official capacity as treasurer, and William J. Carbone violated 2 U.S.C. § 441b(a), a provision of the Act. The Commission also found that the American Association of Physician Specialists, Inc. PAC and Stephen Montes, in his official capacity as treasurer, violated 2 U.S.C. § 434(b), a provision of the Act. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

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In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. We look forward to your response.

On behalf of the Commission,



Cynthia L. Bauerly  
Chair

Enclosures

Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS:** American Association of Physician Specialists, Inc. **MUR 6326**  
American Association of Physician Specialists, Inc. PAC  
and Stephen Montes, in his official capacity as treasurer  
William J. Carbone

**I. GENERATION OF MATTER**

This matter was generated by a complaint filed with the Federal Election Commission ("the Commission") by Timothy J. Bell. See 2 U.S.C. § 437g(a)(1).

**II. INTRODUCTION**

The complaint alleges that the American Association of Physician Specialists, Inc. ("AAPS"), a 501(c)(6) corporation, its separate segregated fund ("SSF"), the American Association of Physician Specialists, Inc. PAC (the "Committee") and an AAPS executive violated the Federal Election Campaign Act of 1971, as amended ("the Act"), because AAPS made, at the executive's authorization, and the Committee accepted, a prohibited corporate contribution in the amount of \$20,000 in 2007 or 2008. See 2 U.S.C. § 441b(a). Specifically, complainant alleges that AAPS's Chief Executive Officer ("CEO"), William J. Carbone, authorized Anthony Durante, AAPS's Director of Finance and Operations, to disburse \$20,000 from AAPS's general operating funds account to the Committee's bank account. Complaint at 2.

1 Complainant also alleges that the Committee's treasurer knew about the \$20,000 deposit at the  
2 time it occurred.<sup>1</sup> *Id.*

3 In a joint response, Respondents assert that the complainant is a disgruntled employee  
4 terminated for poor job performance. See Response at 1 and Attached Affidavit of Linda  
5 Murphy. Respondents acknowledge, however, that AAPS transferred \$20,000 from its general  
6 operating account to the Committee's bank account in 2008. They assert that they transferred  
7 funds to the Committee's account to prevent check overage charges due to bookkeeping and  
8 deposit errors. Response at 2. Respondents maintain that the majority of these funds remained  
9 in the Committee's bank account only temporarily, and that the Committee spent no corporate  
10 funds. Response at 3.

11 Based upon the complaint, the response, and other available information, the Commission  
12 finds reason to believe that AAPS made, and that the Committee accepted, a prohibited corporate  
13 contribution. See 2 U.S.C. § 441b(a). Because section 441b(a) imposes liability for any officer  
14 or director of a corporation that consents to a contribution by a corporation, the Commission  
15 finds reason to believe that William J. Carbone, the CEO of AAPS, violated 2 U.S.C. § 441b(a)  
16 by authorizing the transfer of funds. In addition, because the Committee did not disclose its  
17 receipt and disbursement of the funds at issue in its disclosure reports, the Commission finds  
18 reason to believe that the Committee violated 2 U.S.C. § 434(b).

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<sup>1</sup> Complainant, a former employee of AAPS, filed a supplement to the complaint that reaffirmed his original allegations and acknowledged that he did not timely input the Committee's contributor information into the PAC software, with the result that the Committee had to amend several of its 2009 disclosure reports in January 2010. See Supplemental Complaint.

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**III. FACTUAL AND LEGAL ANALYSIS**

**A. Factual Background**

The complainant, a former Director of Governmental Affairs for AAPS, asserts that on January 28, 2010, while preparing the Committee's 2009 Year-End Report, he "discovered that the final numbers were several thousand dollars out of balance." Complaint at 1. Complainant states that he contacted Anthony Durante, AAPS's Director of Finance and Operations, who advised him that in 2007 or 2008, a former AAPS employee made several thousand dollars in campaign contributions with checks from the Committee's account without adequate funds to cover the amounts. *Id.* Complainant alleges that Mr. Durante advised him that AAPS's CEO, Williams J. Carbone, authorized Durante to disburse \$20,000 from AAPS's general fund bank account to the Committee's bank account. Complaint at 1-2. Complainant also alleges that on that same day he spoke with the Committee's treasurer, who advised the complainant that he knew of the disbursement at the time it occurred. Complaint at 2.

The response states that on April 2, 2008, AAPS transferred \$20,000 in general operating funds to the Committee's bank account. Response at 2 and 4. Respondents assert that they deposited the funds in the Committee's account as a precautionary measure to prevent checks from being returned for insufficient funds due to bookkeeping and depositing errors, but that the Committee never used the funds, and transferred \$14,465 back to AAPS within thirteen days. *Id.* at 3-4.

Respondents provide the following context for the AAPS \$20,000 disbursement to the Committee. In February 2008, AAPS moved the Committee's account from Bank of America to SunTrust. Response at 1. AAPS opened a new PAC account with SunTrust, but kept the Committee's Bank of America account open for pending transactions within the same timeframe.

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1 Response at 2. Respondents also moved the account for AAPS's National Initiative Fund  
2 ("NIF") from Bank of America to SunTrust.<sup>2</sup> *Id.* Both Bank of America accounts were held  
3 open and the new accounts at SunTrust were issued temporary checks and deposit slips. *Id.*  
4 According to the response, in April 2008, Respondents discovered that AAPS's bookkeeper  
5 mistakenly deposited \$1,300 intended for the NIF account into the Committee's SunTrust PAC  
6 account on March 10 and 11, 2008. *Id.*

7 Although it is not clear why, Respondents state that the deposit of \$1,300 of NIF's funds  
8 into the Committee's account could result in the Committee having checks returned for  
9 insufficient funds. *Id.* at 2. Therefore, AAPS "temporarily transferred" \$20,000 on April 2,  
10 2008 from its general operating account to the new SunTrust PAC account. *Id.* On April 4,  
11 2008, the Committee transferred the \$1,300 intended for NIF back to the NIF account. *Id.*  
12 Thereafter, on April 15, 2008, AAPS transferred \$14,465 of the \$20,000 from the Committee's  
13 account back to AAPS's general operating account. The remaining \$5,535, however, stayed in  
14 the Committee's account for almost another year, until the Committee transferred it back to  
15 AAPS on April 13, 2009. *Id.* at 2-3. The response asserts that the \$5,535 remained in the  
16 Committee's account in order to complete the bank account move from Bank of America to  
17 SunTrust, to resolve the initial issues that prompted the account move, to complete unrelated  
18 internal audits, and to complete a full audit of the Committee's account. *Id.* at 3. The response  
19 did not include a copy of any audit findings.

20 The Committee did not disclose any of the transactions described above. Specifically,  
21 the Committee did not disclose its receipt of \$1,300 in NIF funds or its \$1,300 disbursement of

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<sup>2</sup> The Response provides no further information on the NIF. According to AAPS's website, NIF lobbies on behalf of AAPS before members of Congress, state legislatures, state and federal courts, state medical boards, insurance companies, and hospital systems. See <http://www.aapsus.org/National-Initiative-Fund-NIF>. NIF is not registered with the Commission.

1 the funds to the NIF account. *See* Committee's Amended April 2008 Quarterly and Amended  
2 July 2008 Quarterly Reports. In addition, the Committee did not disclose its receipt of \$20,000  
3 from AAPS, the transfer of \$14,465 back to AAPS, the \$5,535 that remained in the Committee's  
4 account until April 2009, or the return of the \$5,535 to AAPS. *See* Committee Amended July  
5 2008 Quarterly and Amended July 2009 Quarterly Reports.

6 **B. Analysis**

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8 **1. Prohibited Corporate Contribution**

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10 The Act prohibits corporations from making any contribution in connection with a  
11 Federal election, and prohibits political committees from knowingly accepting or receiving such  
12 contributions. 2 U.S.C. § 441b(a). This prohibition extends to corporations using general  
13 treasury funds to make contributions to their SSFs. *Id.* However, the Act provides an exception  
14 to the prohibition by excluding from the definition of the term "contribution" a corporation's  
15 payment of the costs incurred in the establishment, administration and solicitation of  
16 contributions to an SSF. 2 U.S.C. § 441b(b)(2)(C); 11 C.F.R. § 114.1(a)(2)(iii). The  
17 Commission's regulations define the terms "establishment, administration, and solicitation costs"  
18 as the costs of office space, phones, salaries, utilities, supplies, legal and accounting fees,  
19 fundraising and other expenses incurred in setting up and running an SSF established by a  
20 corporation. 11 C.F.R. § 114.1(b). The connected organization may pay these costs directly or  
21 through a separate administrative account, but it cannot transfer corporate funds into its SSF's  
22 bank account. *See* 2 U.S.C. § 441b(b)(2)(C); *see also* 11 C.F.R. §§ 114.1(b) and 114.5(b).

23 While acknowledging that AAPS transferred \$20,000 to the Committee from its  
24 corporate treasury funds, Respondents contend that because the funds were never used, the  
25 Respondents did not violate the Act. Response at 2-3. According to the response, \$14,465 of

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1 the original \$20,000 remained in the Committee's account for a short period, April 2, 2008  
2 through April 15, 2008, and that during this time period, the Committee spent only \$718.95. *Id.*  
3 The Respondents contend that AAPS kept the remaining \$5,535 in the Committee's account until  
4 AAPS concluded the bank transfers and an audit. *Id.* at 3.<sup>3</sup> The response provides the  
5 Committee's cash-on-hand figures, as disclosed in its 2008 July Quarterly Report through its  
6 2009 July Quarterly Report, which range between \$23,374.10 and \$36,373.98, to show that the  
7 Committee did not spend the \$5,535 in corporate funds retained in the Committee's account  
8 before transferring it back to AAPS on April 13, 2009. *See id.*<sup>4</sup>

9 Even if AAPS was concerned that the Committee might have checks returned for  
10 insufficient funds, and regardless of the fact that the Committee's cash-on-hand exceeded the  
11 amount of the corporate funds provided by AAPS, AAPS could not make a corporate  
12 contribution to the Committee's bank account. *See* 2 U.S.C. § 441b(a). If checks were returned  
13 for insufficient funds, AAPS could have paid any bank charges directly or through a separate  
14 administrative account. *See* 11 C.F.R. §§ 114.1(b) and 114.5(b); *see also* Advisory Opinion  
15 1981-19 (LAMPAC) (connected organization may establish a separate administrative account for  
16 SSF administrative and fundraising expenses). In the alternative, AAPS could have reimbursed  
17 the Committee for such charges, provided that the reimbursement was made within 30 days of  
18 the Committee's payment of the charges. *See* 11 C.F.R. § 114.5(b)(3).

<sup>3</sup> The Committee's April 2008 Quarterly Report disclosed the receipt of "returned checks" totaling \$13,000 on January 31, 2008. The Reports Analysis Division ("RAD") sent an RFAI to the Committee on May 16, 2008, questioning these transactions. In a May 19, 2008 miscellaneous report, the Committee noted that these entries were incorrect and were actually "voided check[s]." The complainant alluded to a former AAPS employee who allegedly had written checks for several thousands of dollars from the Committee's account which the Committee could not cover. It is unclear based on the available information whether the transactions alluded to by complainant or the RAD exchange with the Committee relate to AAPS's transfer of \$20,000 to the Committee's account.

<sup>4</sup> The response mistakenly labeled the Committee's 2009 April Quarterly and 2009 July Quarterly Reports as 2008 Reports. *See* Response at 3.

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1           Accordingly, the Commission finds reason to believe that the American Association of  
2   Physician Specialists, Inc. made, and that the American Association of Physician Specialists, Inc.  
3   PAC and Stephen Montes, in his official capacity as treasurer, knowingly accepted, prohibited  
4   corporate contributions in violation of 2 U.S.C. § 441b(a).

5           The Act also prohibits any officer or director of a corporation from consenting to the  
6   making of corporate contributions. 2 U.S.C. § 441b(a). The response does not state who at  
7   AAPS authorized the transfer, leaving un rebutted complainant's allegation that AAPS's CEO,  
8   William J. Carbone, directed Anthony Durante, AAPS's Director of Finance and Operations, to  
9   make the transfer of \$20,000 in corporate funds to the Committee's account. Accordingly, based  
10   on the available information, it appears that Mr. Carbone, AAPS's CEO, consented to a  
11   prohibited corporation contribution. Therefore, the Commission finds reason to believe that  
12   William J. Carbone violated 2 U.S.C. § 441b(a).

## 13           2.     Reporting

14           A political committee's disclosure reports must disclose all receipts and disbursements.  
15   See 2 U.S.C. § 434(b). Because the Committee did not disclose any of the transfers of corporate  
16   funds in and out of the Committee's account, the Commission finds reason to believe that the  
17   American Association of Physician Specialists, Inc. PAC and Stephen Montes, in his official  
18   capacity as treasurer, violated 2 U.S.C. § 434(b).

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